

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANGELA D. LAPIERRE,
Plaintiff,

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

NO. CV-12-3099-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 18, and Defendant's Motion for Summary Judgment, ECF No. 21. The motions were heard without oral argument. Plaintiff is represented by D. James Tree. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Jeffrey R. McCain.

I. Jurisdiction

On September 17, 2008, Plaintiff filed a Title XVI application for supplemental security income (SSI). Plaintiff alleged she had been disabled beginning September 9, 1985.¹

¹At the hearing, the ALJ noted that Plaintiff would have been six years old on the alleged onset date. Plaintiff's counsel indicated that the reason he did not amend the onset date is to make sure the records prior to 2002 were sent to the medical expert. Upon question, counsel indicated that he was not making any allegations with regards to Plaintiff's condition prior to the age of 18. (Tr. 43-44.)

1 Her application was denied initially on January 23, 2009, and again denied
 2 on reconsideration on March 23, 2009. A timely request for a hearing was made.
 3 On October 10, 2010, Plaintiff appeared at a video hearing in Yakima,
 4 Washington before Administrative Law Judge (ALJ) Marie Palachuk, who was
 5 presiding in Spokane, Washington. Dr. Ronald Klein, medical expert and K. Diane
 6 Kramer, vocational expert, also participated. Plaintiff was represented by attorney
 7 Chad Hatfield.

8 The ALJ issued a decision on November 15, 2010, finding that Plaintiff was
 9 not disabled. Plaintiff timely requested review by the Appeals Council, which
 10 denied her request for review on August 22, 2012. The Appeals Council's denial
 11 of review makes the ALJ's decision the final decision of the Commissioner. 42
 12 U.S.C. §405(h).

13 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern
 14 District of Washington on July 30, 2012. The instant matter is before this Court
 15 pursuant to 42 U.S.C. § 405(g).

16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any
 18 substantial gainful activity by reason of any medically determinable physical or
 19 mental impairment which can be expected to result in death or which has lasted or
 20 can be expected to last for a continuous period of not less than twelve months."
 21 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
 22 only if her impairments are of such severity that the claimant is not only unable to
 23 do her previous work, but cannot, considering claimant's age, education and work
 24 experiences, engage in any other substantial gainful work which exists in the
 25 national economy. 42 U.S.C. §423(d)(2)(A).

26 The Commissioner has established a five-step sequential evaluation process
 27 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*
 28 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

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1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
 2 404.1520(b). Substantial gainful activity is work done for pay and requires
 3 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
 4 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
 5 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If he is not, the ALJ
 6 proceeds to step two.

7 Step 2: Does the claimant have a medically-severe impairment or
 8 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
 9 have a severe impairment or combination of impairments, the disability claim is
 10 denied. A severe impairment is one that lasted or must be expected to last for at
 11 least 12 months and must be proven through objective medical evidence. 20
 12 C.F.R. § 404.1508-09. If the impairment is severe, the evaluation proceeds to the
 13 third step.

14 Step 3: Does the claimant's impairment meet or equal one of the listed
 15 impairments acknowledged by the Commissioner to be so severe as to preclude
 16 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R.
 17 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
 18 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
 19 impairment is not one conclusively presumed to be disabling, the evaluation
 20 proceeds to the fourth step.

21 Step 4: Does the impairment prevent the claimant from performing work she
 22 has performed in the past? 20 C.F.R. § 404.1520(e). If the claimant is able to
 23 perform her previous work, she is not disabled. *Id.* If the claimant cannot perform
 24 this work, proceed to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy
 26 in view of her age, education, and work experience? 20 C.F.R. § 404.1520(f).

27 If the claimant is found disabled, and there is medical evidence of a
 28 substance use disorder, the ALJ must determine if the substance use disorder is a
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1 contributing factor material to the determination of disability. 20 C.F.R. §
 2 416.935(a). In making this determination, the ALJ evaluates the extent to which
 3 the claimant's mental and physical limitations would remain if the claimant
 4 stopped the substance abuse. § 416.935(b). If the remaining limitations would not
 5 be disabling, the substance use disorder is a contributing factor material to the
 6 determination of disability, and the claimant is not disabled. § 416.935(b)(I). If the
 7 remaining limitations are disabling, the claimant is disabled independent of his or
 8 her drug addiction or alcoholism and the alcoholism or addiction is not a
 9 contributing factor material to the determination of disability. § 416.935(b)(ii).

10 The initial burden of proof rests upon the claimant to establish a *prima facie*
 11 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
 12 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
 13 mental impairment prevents her from engaging in her previous occupation. *Id.* At
 14 step five, the burden shifts to the Commissioner to show that the claimant can
 15 perform other substantial gainful activity. *Id.*

16 **III. Standard of Review**

17 The Commissioner's determination will be set aside only when the ALJ's
 18 findings are based on legal error or are not supported by substantial evidence in
 19 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
 20 (citing 42 .S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
 22 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
 23 evidence is "such relevant evidence as a reasonable mind might accept as adequate
 24 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
 25 ALJ's denial of benefits if the evidence is susceptible to more than one rational
 26 interpretation, one of which supports the decision of the administrative law judge.
 27 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
 28 support either outcome, the court may not substitute its judgment for that of the

1 ALJ.” *Matney*, 981 F.2d at 1019.

2 A decision supported by substantial evidence will be set aside if the proper
 3 legal standards were not applied in weighing the evidence and making the
 4 decision. *Brawner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 5 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
 6 immaterial to the ultimate nondisability determination.” *Stout v. Comm'r, Soc. Sec.*
 7 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

8 **IV. Statement of Facts**

9 The facts have been presented in the administrative transcript and the ALJ’s
 10 decision and will only be summarized here.

11 At the time of the hearing, Plaintiff was 34 years old. She attended school
 12 up to ninth grade, at which time she dropped out because she was pregnant. Before
 13 that, she was in special education and vocational classes. She has five children, but
 14 none live with her. One or two have been adopted and the others live with
 15 relatives in various states. Plaintiff reports being sexually abused by a cousin as a
 16 child and teenager, raped as a teenager, mentally abused by her father, and
 17 mentally and physically abused by her ex-husbands. She gets discouraged very
 18 easy and becomes impatient. She asserts she cannot work because of her anxiety
 19 and paranoia.

20 Plaintiff has struggled with addiction to methamphetamine. At the time of
 21 the hearing, Plaintiff had been living in a clean and sober house for three weeks.
 22 She maintains that when she lives at her dad’s place, he requires her to use
 23 methamphetamine as a condition of her continuing to live there. The record
 24 indicates that she has been homeless on a number of occasions. She does not have
 25 a driver’s license.

26 Plaintiff reports that she was able to maintain sobriety after the birth of her
 27 youngest son for a year and a half in an attempt to get her kids back. Even so, she
 28 decided to let them stay together at her grandmother’s house because they had

1 structure and were attending school and doing really well.

2 Plaintiff entered treatment in April, 2002. She was court ordered to undergo
 3 chemical dependency treatment in order to regain custody of her children. It was
 4 reported that she “participated only minimally in treatment” and completed
 5 assignments “halfheartedly.” (Tr. 514.) She left the treatment in May, 2002. In
 6 2003, she completed 28 days of inpatient treatment.

7 She also entered treatment in June, 2010, and a week later she left treatment
 8 against medical advice. (Tr. 1033.). At that time, she reported that she had
 9 participated in one detoxification program, one outpatient treatment program, and
 10 two inpatient treatment programs. (Tr. 1034.) She also began inpatient treatment in
 11 August, 2010, but left against medical advice in September, 2010. (Tr. 1035.)

12 **V. The ALJ’s findings**

13 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
 14 activity since September 17, 2008, the application date. (Tr. 25.)

15 At step two, the ALJ found Plaintiff has the following severe impairments:
 16 posttraumatic stress disorder and alcohol and methamphetamine dependence/abuse
 17 (Tr. 25.)

18 At step three, the ALJ found Plaintiff’s impairments or combination of
 19 impairments meet or medically equal section 12.06 and 12.09 of CFR Part 404,
 20 Subpart P, Appendix 1. (Tr. 29.) In conducting the DAA analysis, the ALJ found
 21 that if Plaintiff stopped the substance use, she would not have any impairment or
 22 combination of impairments that meets or medically equals any of the impairments
 23 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 30.)

24 The ALJ found that if Plaintiff stopped the substance use, she would have
 25 the residual functional capacity to perform a full range of work at all exertional
 26 levels. She can understand, remember, and carry out simple, routine and repetitive
 27 tasks, but with no contact with the public. She can perform at a productive pace,
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1 but may need additional time to adjust to changes in the work environment. She is
2 capable of only occasional supervision because she may not respond well to
3 supervisor's criticism. (Tr. 30.)

4 At step four, the ALJ concluded that if Plaintiff stopped the substance
5 abuse, she would be able to perform past relevant work as a care giver/home
6 health attendant. (Tr. 31.)

7 **VI. Issues for Review**

8 Plaintiff presents the following issues for review:

9 1. Did the ALJ improperly reject the opinions of Dr. Trivisonno, Dr.
10 Cooper, Mr. Cute, and Mr. Macias?

11 2. Did the ALJ commit reversible error by failing to find borderline
12 personality disorder, dissociative disorder, and depressive disorder as step two
13 severe impairments?

14 3. Did the ALJ commit reversible error by improperly rejecting/omitting
15 Dr. John McRae's opinion from her decision?

16 4. Did the ALJ commit reversible error by not following the
17 Commissioner's directives regarding co-occurring mental disorders and
18 alcoholism and drug addiction (DAA)?

19 **VII. Discussion**

20 **1. Relevant Period of Adjudication**

21 Although not addressed by the parties, the ALJ throughout her order limited
22 the evidence considered to the relevant period of adjudication. (Tr. 22, 29, 32.)
23 The ALJ noted that Plaintiff previously filed four claims for disability benefits
24 which were subsequently denied. (Tr. 22.) The ALJ did not specifically identify
25 the relevant period, but did indicate that any discussion of the previously
26 submitted evidence was relevant only for purposes of considering whether or not
27 Plaintiff's medical condition worsened. (Tr. 22.) The ALJ declined to reopen the
28

1 previous denial determinations. (Tr. 22.) *See* 20 C.F.R. § 404.989 (allowing the
 2 Secretary to reopen a decision if there is “good cause” to do so, as where new and
 3 material evidence is furnished or the evidence that was considered in making the
 4 determination clearly shows on its face that an error was made).

5 Plaintiff filed a prior application for SSI benefits on September 30, 2004.
 6 The claim was initially denied on April 7, 2005 and upon reconsideration on
 7 September 19, 2005. (Tr. 91.) Although Plaintiff appealed the decision, she failed
 8 to appear at the hearing. Consequently, the September 19, 2005 determination was
 9 found to remain in effect. The relevant time period then for this adjudication is
 10 between September 19, 2005 and November 10, 2010.

11 Plaintiff testified at the hearing she had periods of sobriety. Specifically, she
 12 stated that she was sober from 2003, after the birth of her youngest child, to a year
 13 and a half later. (Tr. 63.) Then, she was clean again about three years later, and her
 14 sobriety lasted around two years. (Tr. 63.) She started using again when she was
 15 staying at her dad’s house in 2008. According to Plaintiff, then, she was sober
 16 between 2003 to 2004 (1 ½ years) and between 2007 and 2008 (2 years). The
 17 relevant time frame to determine whether her substance abuse caused her PTSD
 18 then would be her reported period of sobriety, beginning sometime in 2007 and
 19 ending sometime in 2008.

20 Plaintiff asserts the ALJ erred in not considering the opinions of Dr.
 21 Trivisonno, Dr. Cooper, Mr. Cute, and Ms. Macias in determining whether her
 22 impairments affected her functioning severely when she had an extended period of
 23 abstinence. These opinions were given outside the relevant time period and
 24 Plaintiff is not asserting that her condition has worsened. Nor did she ask the ALJ
 25 to reopen the prior determination. Because the opinions are not relevant to the
 26 ALJ’s decision, the ALJ did not err in not addressing these opinions in her order.
 27 Also, in making her arguments concerning Ms. Macias, Plaintiff cites to Tr. 791-
 28

1 794. This evaluation, however, does not appear to be pertaining to the Plaintiff.
2 Rather, it appears to be an evaluation for William C. LaPierre. The ALJ did not err
3 when she did not rely on this evaluation since it did not pertain to Plaintiff.

4 Finally, Plaintiff argues the ALJ erred in failing to address Dr. John
5 McRae's April 1, 2004 opinion that Plaintiff was disabled. Dr. McRae's opinion
6 was also given outside the relevant time period. Additionally, Dr. McRae's reports
7 were neither significant nor probative, because they merely restated reports from
8 other treatment providers, and because he failed to factor out the effects of
9 Plaintiff's drug use.

10 **2. Step Two Analysis**

11 Plaintiff argues the ALJ erred by failing to find borderline personality
12 disorder, dissociative disorder, and depressive disorder as severe impairments in
13 step two of the analysis.

14 The ALJ noted that a number of diagnoses, other than posttraumatic stress
15 disorder, were noted throughout the record. However, the ALJ relied on Dr.
16 Klein's testimony that only posttraumatic stress disorder met the DSM-IV criteria.
17 Dr. Klein noted that there was not psychological testing to support a diagnosis of
18 adjustment disorder, depression, dissociative personality, borderline personality
19 disorder, and anxiety disorder. (Tr. 46-50.) Dr. Klein indicated that he did not put
20 a lot of weight into these diagnoses because: (1) they evidenced diagnostic
21 confusion, i.e. were not established; and (2) they failed to separate out the impact
22 of the illicit drug as required by the DSM-IV. (Tr. 50.)

23 An impairment or combination of impairments is "severe" within the
24 meaning of the regulations if it significantly limits an individual's ability to
25 perform basic work activities. 20 C.F.R. §§ 404.1521, 216.921. An impairment or
26 combination of impairments is "not severe" when medical and other evidence
27 establish only a slight abnormality or a combination of slight abnormalities that

1 would have no more than a minimal effect on an individual's ability to work. *Id.*

2 "When there is conflicting medical evidence, the Secretary must determine
 3 credibility and resolve the conflict." *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th
 4 Cir. 1992). More weight is given to a treating physician's opinion than to the
 5 opinion of a non-treating physician because a treating physician is employed to
 6 cure and has greater opportunity to know and observe the patient as an individual.
 7 20 C.F.R. § 416.927(d)(1); *see also Andrews v. Shalala*, 53 F.3d 1035, 1040-41
 8 (9th Cir. 1995). Likewise, greater weight is given to the opinion of an examining
 9 physician than a non-examining physician. *Andrews*, 53 F.3d at 1041. Opinions of
 10 physicians who examined the claimant only once should be given less weight than
 11 the physicians who treated her. 20 C.F.R. § 404.1527; *Benecke v. Barnhart*, 379
 12 F.3d 587, 592 (9th Cir. 2004).

13 Here, the ALJ did not err in relying on Dr. Klein's opinions to determining
 14 Plaintiff's severe impairments. Plaintiff asserts that Dr. Trivisonno diagnosed
 15 PTSD, dissociative disorder, and possible borderline personality disorder.
 16 However, Dr. Trivisonno noted that Plaintiff had a history of being unreliable in
 17 terms of follow-up with treatment and observed that she tends to show up
 18 whenever she has a GAU reassessment, so he suspected secondary gain issues.
 19 (Tr. 560.) He ultimately concluded that most of her psychiatric history is drug-
 20 related. (Tr. 560.) Moreover, as set forth above, Dr. Trivisonno's evaluation was
 21 conducted in 2004, which is outside the relevant time frame. The ALJ did not err
 22 in not relying on Dr. Trivisonno's opinions in conducting the step two analysis.

23 Plaintiff also argues Dr. Cooper diagnosed major depressive disorder,
 24 PTSD, and borderline personality disorder. Dr. Cooper evaluated Plaintiff on April
 25 8, 2003. (Tr. 515.) On Axis I, Dr. Cooper found Plaintiff had a major depressive
 26 disorder, recurrent, in partial remission and posttraumatic stress disorder, chronic:
 27 Axis II, borderline intellectual functioning and borderline personality disorder:
 28

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1 Axis III, arthritis: Axis IV, occupational, economic, educational; and Axis V, GAF
 2 50. (Tr. 519.) She noted that information from Plaintiff regarding her substance
 3 abuse differed from what was indicated from the record. (Tr. 515.) For instance,
 4 Plaintiff indicated in referral records that she used drugs as a teenager, but laters
 5 stated she did not use street drugs until she was 21 years; she stated she had last
 6 used drugs in 2001, but there was evidence that she used in 2002. (Tr. 515.) Dr.
 7 Cooper noted that Plaintiff had several assault charges and ignored restraining
 8 orders while under the influence of street drugs. (Tr. 515.) Dr. Cooper relied on
 9 Plaintiff's testimony that she was drug-free for a year, but did not indicate whether
 10 her diagnosis was attributable to Plaintiff's drug use. (Tr. 520.)

11 The ALJ did not err in not relying on Dr. Cooper' diagnoses in conducting
 12 the step-two analysis. Dr. Cooper's own report revealed that she was uncertain
 13 regarding Plaintiff's self-reported period of sobriety. The ALJ also found that
 14 Plaintiff's testimony regarding her sobriety was not reliable or credible.² Also, Dr.
 15 Cooper's evaluation was conducted in 2003, which is outside the relevant time
 16 frame.

17 Moreover, even if the ALJ erred, such error was harmless because the ALJ
 18 concluded that Plaintiff's PTSD was a severe impairment. *See Burch v. Barnhart*,
 19 400 F.3d 676, 682 (9th Cir. 2005); *Gray v. Comm'r of Soc. Sec. Admin.*, 2010 WL
 20 440581 *2 (Feb. 8, 2010 9th Cir.). Also, the ALJ considered her non-severe
 21 impairments in determining Plaintiff's residual functional capacity, *i.e.* able to
 22 understand, remember, and carry out simple, routine and repetitive tasks; no
 23 contact with the public; additional time to adjust to changes in the work
 24 environment; and only occasional supervision.

25 **3. DDA Analysis**

26 The underlying issue is whether her drug abuse is material to her disability.

27
 28 ²Plaintiff has not challenged this finding.

1 The ALJ concluded that the limitations described by the medical sources, i.e.
 2 treatment providers and examiners, were based on Plaintiff's drug use because the
 3 providers often did not realize or were not told about the ongoing substance abuse.
 4 The ALJ found the evidence of record clearly shows that Plaintiff was abusing
 5 methamphetamine and alcohol throughout the judiciary period.³ (Tr. 29.)

6 Here, the ALJ properly conducted the DAA analysis and the ALJ's
 7 conclusions are supported by the record.

8 **VIII. Conclusion**

9 Plaintiff has not met her burden of showing the ALJ committed legal error,
 10 or that her conclusion that Plaintiff was not disabled from September 19, 2005, to
 11 November 15, 2010, is not supported by substantial evidence. The ALJ properly
 12 found that Plaintiff was capable of performing the requirements of a care
 13 giver/home health attendant. Also, the record clearly establishes that Plaintiff
 14 would not be disabled if she stopped the substance use, and thus, would mandate a
 15 finding of not disabled. *See* 42 U.S.C. § 423(d)(2)(C).⁴

16 Accordingly, **IT IS HEREBY ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment, ECF No. 18, is **DENIED**.
 18 2. Defendant's Motion for Summary Judgment, ECF No. 21, is

20 ³The ALJ cited to the following Exhibits: B10F, B17F/30-31, B20F, and B21F.
 21 B10F is a consultative examination report from Dr. Emma Billings (2009);
 22 B17F/30-31 is medical records from DSHS Yakima (2009); B20F is medical
 23 records from Yakima Valley Farm Workers Clinic (2009-2010); and B21F is
 24 treatment records from Nina Rapisarda, MSW. (2010) (Tr. 29.)

25 ⁴ (C) An individual shall not be considered to be disabled for purposes of this
 26 subchapter if alcoholism or drug addiction would (but for this subparagraph) be a
 27 contributing factor material to the Commissioner's determination that the
 28 individual is disabled. 42 U.S.C. § 423(d)(2)(C).

GRANTED.

3. The decision of the ALJ denying benefits is **affirmed**.

4. The District Court Executive is directed to enter judgment in favor of Defendant and against Plaintiff.

5. The Stipulated Motion RE: Scheduling Order, ECF No. 13, is **DENIED**, as moot.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies to counsel, and **close the file**.

DATED this 14th day of February, 2014.

s/Robert H. Whaley

ROBERT H. WHALEY
United States District Judge

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